

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**AMY STATON**

Claimant

VS.

**USD 231**

Respondent

AND

**KANSAS ASSOC. OF SCHOOL BOARDS**

**WC FUND, INC.**

Insurance Carrier

Docket No. 1,003,233

**ORDER**

Claimant requests review of the December 23, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

**ISSUES**

The ALJ denied claimant's request for temporary partial disability as he found that her temporary disability stems from a knee injury, and K.S.A. 44-510e limits temporary partial disability benefits to disabilities not covered by the schedule set forth in K.S.A. 44-510d.

The claimant requests review of this determination alleging the ALJ "exceeded his jurisdiction in denying Mrs. Staton's request for temporary partial disability benefits by finding that Mrs. Staton has only sustained a disability due to her left leg and not to her body as a whole."<sup>1</sup>

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<sup>1</sup> Claimant's Brief at 5 (filed Jan. 8, 2004).

Respondent maintains this appeal should be dismissed as the Board has no jurisdiction over the issue of temporary disability at this juncture. In the alternative, respondent contends ALJ's Order should be affirmed as the ALJ did not exceed his jurisdiction in denying claimant's request.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed that claimant sustained an accidental injury on September 7, 2001 when she was attacked and thrown to the ground by a student. Respondent has provided treatment through Dr. Cris D. Barnthouse and Dr. Daniel D. Schaper, which included two surgeries to her left knee and a third procedure is anticipated. On April 28, 2003 claimant was placed on work restrictions which limited her to 25 hours of clerical work per week. On September 18, 2003, Dr. Schaper permitted her to increase her work activities to 30 hours per week. She has not been released to return to her position as a special education teacher.

Claimant has not yet returned to her employment with respondent but has been employed by the Academy of Certified Birth Educators since September 2002, working within the restrictions imposed by the treating physicians. This position, however, pays her less than she was making as a special education teacher. This reduction in her wage is the basis for her claim for temporary partial disability benefits. Although temporary partial benefits were paid up to October 18, 2003, no benefits were paid after that time, she continues to work 25 hours per week.

The ALJ concluded as follows:

K.S.A. 44-510e provides for temporary partial disability benefits of 2/3 of the difference between the worker's average weekly wage and the worker's actual earnings following the injury. However, temporary partial disability under K.S.A. 44-510e is limited to disability not covered by the schedule in K.S.A. 44-510d. The respondent contends that the claimant's temporary partial disability arises from a disability to the knee, which is covered by the K.S.A. 44-510d schedule, and therefore temporary partial disability benefits are not proper.<sup>2</sup>

The ALJ went on to find that the evidence supported respondent's position. He found that claimant was receiving treatment for a knee injury. He acknowledged that Dr. Schaper referenced claimant's sore hip and back but concluded that all the treatment she's

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<sup>2</sup>ALJ Order (Dec. 23, 2003) at 1.

received relates to her knee injury. He ultimately found “[t]he disability is to the claimant’s leg, which is covered by K.S.A. 44-510d(a)(16).”<sup>3</sup> Thus, pursuant to K.S.A. 44-510d(b), temporary partial disability benefits are specifically excluded. The ALJ issued his Order on December 23, 2003 denying claimant’s preliminary hearing request.

Not every preliminary hearing Order is appealable to the Board. K.S.A. 44-534a and K.S.A. 44-551 restrict a party’s right to appeal from a preliminary hearing to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the benefits allowed or when certain threshold issues are the subject of the preliminary decision. Those threshold issues include “whether an employee suffered an accidental injury, whether the injury arose out of and in the course of the employee’s employment, whether notice is given or claim timely made, or whether certain defenses apply.”<sup>4</sup>

The Board has held that temporary partial disability is to be treated the same as, and is considered a form of, temporary total disability compensation, as contained within the provisions of K.S.A. 44-510e(2).<sup>5</sup> As temporary total and temporary partial disability are to be treated similarly at preliminary hearing, the Board finds an award of temporary partial disability compensation is a nonjurisdictional decision, not subject to appeal from a preliminary hearing, just as is temporary total disability compensation.

Likewise, the Board finds there is no basis to conclude the ALJ exceeded his jurisdiction in denying claimant’s request for temporary partial benefits. The ALJ was correct that the statute prohibits temporary partial benefits for an injury to a scheduled member. It may be that as this claim develops, claimant’s disability will extend beyond her knee. But as of now, that is not the case. In any event, under K.S.A. 44-534a, the ALJ clearly has jurisdiction to decide claimant’s entitlement to temporary partial disability benefits. Right or wrong, that decision is not appealable to the Board from a preliminary hearing.<sup>6</sup> Therefore, the claimant’s appeal on this issue is dismissed.

**WHEREFORE**, it is the finding, decision and order of the Board that claimant’s appeal of the Order of Administrative Law Judge Kenneth J. Hursh dated December 23, 2003, is dismissed.

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<sup>3</sup> Id.

<sup>4</sup> K.S.A. 44-534a (FURSE 2000)

<sup>5</sup> *Brown v. Lawrence-Douglas County Board of Health*, No. 205,848, 1996 WL 167237 (Kan. WCAB Mar. 29, 1996).

<sup>6</sup> *Jurado v. Poky Feeders, Inc.*, No. 201,482, 1997 WL 310391 (Kan. WCAB May 21, 1997).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2004.

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BOARD MEMBER

c: Samantha N. Benjamin, Attorney for Claimant  
Frederick Greenbaum, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director